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No.

In The

Supreme Court of the United States

October Term, 1997

SEAHORSE COASTAL ASSISTANCE & TOWING and STATE INSURANCE FUND,

Petitioners,

vs.

THEODORE FLEISCHMANN,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. To be a covered employee under the Longshore and Harborworkers' Compensation Act, ("LHWCA") 33 U.S.C. § 901, *et seq.*, a claimant must prove that he was engaged in "maritime employment" as that term is defined under § 902(3) of the Act. When a marine construction worker's injury occurs on land, must the employment have some connection to loading, unloading, repairing, building or breaking a vessel or must the employment have some connection to maritime commerce or navigation?

2. To be a covered employee under the LHWCA, 33 U.S.C. § 901, *et seq.*, ("LHWCA"), a claimant must also prove that he was injured on "navigable waters" which includes

> any adjoining pier, wharf, drydock, terminal, building way, marine railway or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling or building a vessel.

When a marine construction worker's injury occurs on land, must the structure on which a claimant is injured have some connection to loading, unloading, repairing, building or breaking a vessel?

INTERESTED PARTIES

The following persons and entities were parties below and have an interest in the outcome of the case:

1. Seahorse Coastal Assistance & Towing;

2. New York State Insurance Fund;

3. Director, Office of Worker's Compensation Programs;

4. United States Department of Labor;

5. Theodore Fleischmann.

STATEMENT OF PARENT, SUBSIDIARY AND AFFILIATE CORPORATIONS

Petitioner, Seahorse Coastal Assistance & Towing, is not affiliated with any corporations and is not a parent or subsidiary of any company.

Petitioner State Insurance Fund is a state agency of the State of New York, pursuant to the New York Workers' Compensation Law, Article 6, Sections 76 through 100.

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PRELIMINARY STATEMENT

Seahorse Coastal Assistance & Towing and the New York State Insurance Fund Petition for a Writ of Certiorari to review the opinion of the United States Court of Appeals for the Second Circuit entered on February 23, 1998.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 137 F.3d 131. The Benefits Review Board, granting administrative affirmance, dated September 12, 1996 (App. p. 18a), is unreported. The Decision and Order denying benefits of Administrative Law Judge C. Martin Bober (App. p. 20a) is also unreported.

STATEMENT OF JURISDICTION

Petitioners seek review of an opinion entered on February 23, 1998 by the United States Court of Appeals for the Second Circuit. This Petition for a Writ of Certiorari is filed within ninety (90) days of the entry of the February 23, 1998 opinion. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) (1998).

CONSTITUTIONAL PROVISION

Article III, Section 2, Clause 1 of the United States Constitution provides, in relevant part, that "the judicial powers shall extend to all cases of admiralty and maritime jurisdiction." *See* Const. Art. 3, § 2, cl. 1.

LONGSHORE & HARBORWORKER'S ACT PROVISIONS

(33 U.S.C. § 901, *et seq.* (1998))

§ 902(3) of the Longshore & Harborworker's Compensation Act states in pertinent part, as follows:

The term "employee" means any person engaged in maritime employment, including any longshoremen or any other persons engaged in longshoring operations, and any harborworker, including a ship repairman, shipbuilder, and ship breaker, but such term does not include —

(A) individuals employed exclusively to perform office, clerical, secretarial, security or data processing work;

(B) individuals employed by a club, camp, recreational operations, restaurant, museum, or retail outlet;

(C) individuals employed by a marina and who are not engaged in the construction, replacement, or expansion of such marina (except for routine maintenance);

(D) individuals who are (i) employed by suppliers, transporters or vendors; (ii) are temporary doing business on the premises of an employer described in paragraph 4, and; (iii) are not engaged in work normally performed by the employees of that employer under this chapter;

(E) aquacultural workers;

(F) individuals employed to build, repair, or dismantle any recreational vessel under 65 feet in length;

(G) a master or member of the crew in any vessel;

(H) any person engaged by a master to load or unload or repair any small vessel under eighteen tons net;

if individuals described in clauses "A" through "F" are subject to coverage under the State Worker's Compensation Law.

§ 903(a) of the Longshore & Harborworker's Compensation Act, provides in pertinent part as follows:

> Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, drydock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

33 U.S.C. § 903(a) (1998).

STATEMENT OF THE CASE

Jurisdiction of the Department of Labor, Office of Administrative Law Judges, was based upon § 33 U.S.C. § 901, *et seq.* (1998).

PROCEDURAL HISTORY

On October 28, 1993, a hearing was held pursuant to notice under the LHWCA for a right knee injury sustained by Theodore Fleishman (Mr. Fleishman), while in the scope of his employment

with Seahorse Coastal Assistance & Towing Company ("Seahorse" or "Employer"). Seahorse was insured by the New York State Insurance Fund ("the Fund") which had paid workers' compensation benefits under the New York Workers' Compensation Law. Seahorse and the Fund attended the hearing contesting only the issue of whether Mr. Fleischmann met the situs and status requirements under the LHWCA (App. p. 24a).

Seahorse was hired to repair a retaining wall on a private property. The retaining wall abutted a canal in Oyster Bay Long Island, on Center Island, New York. *See Fleischmann v. Director, Office of Workers' Compensation Programs*, 137 F.3d 131, 133 (2d Cir. 1998). The retaining wall had collapsed forward into the water. *See id.* The purpose of the retaining wall was to prevent the erosion of the land by the water. Mr. Fleischmann worked primarily on a floating dock, tied to a barge. Mr. Fleischmann was injured when he fell landward of the retaining wall into an area containing dredging materials and water. *See Fleischmann*, 137 F.3d at 133-4.

ALJ Bober[1] issued a Decision and Order finding that Mr. Fleischmann failed to meet both the "status" and "situs" tests under 33 U.S.C. § 902(3) and § 903(a) of the LHWCA (App. pp. 20a-27a). Mr. Fleischmann filed a Petition for Review to the Benefits Review Board ("BRB") seeking a reversal of ALJ Bober's decision. Because the case was not heard or ruled on for more than one (1) year after the Petition for Review was filed, the BRB refused to rule on the case and ALJ Bober's decision was therefore considered administratively affirmed under Public Law 104-134 (App. pp. 18a-19a).

In December, 1996, Mr. Fleishman appealed to the United States Court of Appeals for the Second Circuit ("Second Circuit").

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1. The Administrative Law Judge who heard the case retired before rendering the decision.

In January, 1997, the Director, Office of Workers' Compensation Programs ("the Director") filed its Brief seeking reversal of ALJ Bober's decision, followed by Seahorse and the Fund's brief, also filed in or about January of 1997. On February 23, 1998, the decision of ALJ Bober was reversed and remanded by the Second Circuit based on the Second Circuit's conclusion that Mr. Fleishman's "general employment of building piers and docks" sufficed to "establish the requisite connection to ships to confer him with status of a harborworker." *Fleishmann*, 137 F.3d at 137. Further, the Second Circuit found that the retaining wall was a "pier" as that term is defined under § 903(a) of the Act. *See Fleischmann* 137 F.3d at 139.

REASONS FOR GRANTING THE WRIT

I.

INTRODUCTION

Left open by this Court's decision in *Director, Office of Workers' Compensation Programs, etc. v. Perini North River Assoc.*, is the question whether a marine construction worker[2] who is injured on certain structures adjoining navigable waters is engaged in "maritime employment" under the LHWCA.[3] *See Director, Office of Workers' Compensation Programs, etc. v. Perini North River Assoc.*, 459 U.S. 297, 299 (1983). *Perini* held that, regardless of status, if the claimant was covered under the LHWCA before the 1972 amendments for injuries because they occurred on navigable waters, then he is covered for injuries on

2. The term "marine construction worker" refers to employees who engaged in building and repairing facilities, piers and fixed objects in water and excludes ship repairers and shipbuilders who are covered by the LHWCA.

3. This case presents the "occasion . . . to determine other possible applications of the status test to activities performed on the expanded landward situs." *Perini*, 499 at 318 n.27.

navigable waters after the 1972 amendments. *See Perini*, 459 U.S. at 325.

Fleischmann, a marine construction worker, was injured on land while engaged in building a retaining wall for a private residence and although he testified he spent 75% of his time on a barge, his work had no relationship to loading, unloading, building or repairing a vessel. The Second Circuit Court of Appeals' reversal of the ALJ's finding of no coverage conflicts with Congress' requirement that covered maritime employees have some connection to loading or unloading a vessel or building or repairing it. *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 424 (1985). Moreover, this case conflicts with the Ninth Circuit's opinion in *McGray Construction Co. v. Director, Office of Workers' Compensation Programs*, 112 F.3d 1025 (9th Cir. 1997). *McGray* held that a pile driver like Mr. Fleischmann was not engaged in maritime employment but awarded LHWCA benefits, because his previous employment involved marine diving. *Id.* at 1033. Exercising jurisdiction in this case will resolve the question whether marine construction workers have the statutory status that enables them to carry the LHWCA shoreward.

Also to be answered is the "grammatical point"[4] left open in *Northeast Marine Terminal Co. v. Caputo*: must the specific structures enumerated by the Act under situs have some connection to the loading, unloading, repairing or building a vessel? *See Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 280 (1977). The lower court's determination in this case directly conflicts with the Eleventh Circuit Court of Appeals holding that an identical retaining wall at a private residence is not a "pier" under the LHWCA. *Brooker v. Durocher Dock &*

4. "[I]t is not at all clear that the adjectival phrase 'customarily used . . .' was intended to modify more than the preceding noun phrase 'other areas.' " *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 280 (1977). *See* Larson, Workmen's Compensation § 89.35(a) at 16-308-309(1997).

Dredge, 133 F.3d 1390, 1393 (11th Cir. 1998). Contrary to Congressional intent, the Second Circuit has extended the LHWCA to cover repairs performed on private non-commercial properties having no connection to loading, unloading, repairing or building ships.

The Writ of Certiorari should be granted to answer the questions left open by *Director, Office of Workers' Compensation Programs, etc. v. Perini North River Assoc.* and *Northeast Marine Terminal Co. v. Caputo* which will resolve the conflicts between the circuits and eliminate the uncertainty and confusion and provide clear guidelines for the courts and agencies who are required to decide the benefits available to this class of workers.

A. Background

The federal/state conflict regarding Workers' Compensation coverage for injuries to employees who work on both navigable water and adjacent structures has undergone a tortured history, commencing with this Court's decision in *Southern Pacific Co. v. Jensen* holding that state compensation acts could not be constitutionally applied to an injury on navigable waters. *See Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917). Attempts by Congress to extend workers' compensation laws of states to injuries on navigable waters were similarly ruled unconstitutional. *See Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920). In 1927, Congress enacted the first Longshoremen and Harbor Workers Compensation Act (LHWCA) providing for compensation to an employee for death occurring on the navigable waters of the United States "if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law." *Longshore and Harbor Workers Compensation Act of 1927*, 44 Stat. 1424 (codified as 33 U.S.C. § 901, *et seq.*).

At first, the new statute was held to be mutually exclusive with state compensation acts. *See Parker v. Motor Boat Sales, Inc.*, 314 U.S. 244, 247-48 (1941). The LHWCA could not apply to injuries covered by state compensation. *See* Gilmore & Black, *The Law of Admiralty* § 6-50 at 425 (2d ed. 1975). However, the exclusivity worked hardships on those who having been injured on navigable waters made the wrong choice in the "maritime but local" areas where state law applied. *Id.* § 6-49 at 419. A more pragmatic view of the statute allowed for a "twilight zone", wherein federal or state law could apply to workers who continually cross the "*Jensen* line." *Davis v. Department of Labor and Industries of Washington*, 317 U.S. 249, 256 (1942). If the injury occurred on navigable waters and the employee chose the LHWCA remedy, then it applied. *See Calbeck v. Travelers Ins. Co.*, 370 U.S. 114, 131 (1962). While there was serious uncertainty as to the application of state law to injuries occurring on navigable waters, it was quite clear that injuries landward of the "Jensen line" were not covered by the LHWCA. *See Nacirema Operating Co. v. Johnson*, 396 U.S. 212, 216-224 (1969).

The 1972 amendments to the LHWCA moved the *Jensen* line landward and covered injuries not only navigable waters of the United States, but also:

> Any adjoining pier, wharf, dry dock, terminal, building way, marine railway or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel.

Longshore and Harbor Workers' Compensation Act Amendments of 1972, 86 Stat. 1251 (1972), (codified as amended at 33 U.S.C. § 903(a) (1998)).

The 1972 amendments also created a status requirement by limiting the definition of employee:

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder and ship-breaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under 18 tons net.

Longshore and Harbor Workers' Compensation Act Amendments of 1972, 86 Stat. 1251 (1972), (codified as amended at 33 U.S.C. § 902(3) (1998)).

B. Status

It was clear that to be covered, an employee needed to meet both the status and situs requirements. *See Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 264-265 (1977). The Act enumerates certain occupations which are covered. *See* 33 U.S.C. § 902(3). However, marine construction workers are not specifically mentioned in the Act. *See* C. Tucker, *Coverage and Procedure Under the Longshoremen's and Harbor Workers' Compensation Act Subsequent to the 1972 Amendments*, 55 Tul. L. Rev. 1056, 1079 (1981). While Congress had expanded the situs of coverage landward, that expansion was limited to employees engaged in longshoring and ship repairing. *See Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 423-424 (1985). As long as they were engaged in longshoring or ship repairing, it did not matter that they never spent time on actual navigable waters; longshoremen who spent their entire day on land were eligible. *See P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69 (1979). Moreover, the restriction on status only applied to the landward extension of the LHWCA; in other words, marine construction workers who were previously covered before the 1972 amendments continue to be covered for injuries that occur on navigable waters,

notwithstanding that they might not have met the status requirement of 33 U.S.C. § 902(3). *See Director, Office of Workers' Compensation Programs v. Perini North River Assoc.*, 459 U.S. 297 (1983).

Two questions arise after *Perini*: first, are marine construction workers covered for injuries on land? Secondly, are all injuries on the navigable waters covered no matter what the status of the worker? The second question has caused a conflict between the Fifth and Eleventh Circuits: whether all injuries that occur on navigable waters are covered by the LHWCA. *Compare Randall v. Chevron, U.S.A. Inc.*, 13 F.3d 888 (5th Cir. 1994), *cert. dismissed sub nom. Sea Savage v. Chevron, U.S.A.*, 512 U.S. 1265 (1994) (worker injured while transiently or fortuitously on navigable waters held covered) *with Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991) (land based electrician injured in boat not covered, because there was nothing inherently maritime about his tasks). The first question — whether a marine construction worker is covered by the LHWCA for injuries on the adjacent structures to navigable waters — was expressly left open by *Perini*. Both questions can be answered with guidance on the meaning of "maritime employment."

In defining status, the LHWCA provides a list of personnel intended to be covered: "longshoremen . . . and any harborworkers, including the ship repairer, shipbuilder and ship breaker. . . ." 33 U.S.C. § 902(3).

> While "maritime employment" is not limited to the occupations specifically mentioned in § 2(3), neither can it be read to eliminate any requirement of a connection with the loading or construction of ships.

Herb's Welding, Inc. v. Gray, 470 U.S. 414, 423-424 (1985). Some connection to longshoring is sufficient: employees injured

while maintaining landside equipment essential to the loading and unloading process have the required nexus. *See Chesapeake and Ohio Railway Co. v. Schwalb*, 493 U.S. 40, 46-47 (1989).

The Second Circuit in this case deviated from this Court's holding in *Herb's Welding* and its reasoning in *Schwalb* when the Second Circuit held that a worker injured on land who had no connection with loading or unloading of a vessel or repairing or building a ship met the status requirement under the LHWCA. *Compare Herb's Welding*, 470 U.S. at 423-424, *and Schwalb*, 493 U.S. at 46-47, *with Fleischmann v. Director, Office of Workers' Compensation Programs*, 137 F.3d 131, 135-138 (2d Cir. 1998). Granting undue deference[5] to the Director of Office of Worker's Compensation Program's interpretation of the LHWCA, the Second Circuit distinguished *Schwalb* and *Herb's Welding* on the basis that a worker who is injured on a pier or a wharf need not have a connection with the loading or unloading

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5. "Although agency determinations within the scope of delegated authority are entitled to deference, it is fundamental that an agency may not bootstrap itself into an area in which it has no jurisdiction." *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1988) (*quoting Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973)). Deference to an agency's interpretation of its own jurisdiction is unwarranted as it ignores an agency's potential bias to broaden its jurisdiction beyond Congressional intent. *See generally* Sunstein, *Law and Administration After Chevron*, 90 Colum. L. Rev. 2071, 2101 (1990) ("The agency might be deciding whether . . . its authority extends to new or unforeseen areas. . . . It would be peculiar, therefore, to defer to the agency's views.") The Second Circuit felt that the deference accorded to the Director, Office of Workers' Compensation as to the meaning of "status" was not clearly equivalent to deferring to an agency's interpretation of its own jurisdiction. *See Fleischmann*, 137 F.3d at 136 n.2. However, "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 843 n.9 (1984), *reh'g denied*, 468 U.S. 1227 (1984). Expanding the definition of harbor worker to include workers not involved in longshoring or shipbuilding or repairing contravenes the clear intent of Congress. *Herb's Welding v. Gray*, 470 U.S. at 423-424.

of a vessel or the repairing or building of a vessel, because he could be considered a "harbor worker" which is one of the enumerated occupations in the statute. *See Fleischmann*, 137 F.3d at 135-138.

This disposition of the status issue begs the issue as to who is a harbor worker and blows a hole in the limitation on the coverage of the LHWCA intended by Congress. Anyone who performs some work on the water could be called a "harbor worker" and to do so would essentially eliminate the requirement that the worker be a "maritime employee."[6] Moreover, the Ninth Circuit has ruled that a "harbor worker" must be someone who builds or repairs a structure used to facilitate maritime commerce or navigation. *McGray v. Director, Office of Workers' Compensation Programs*, 112 F.3d 1025, 1030 (9th Cir. 1997). Granting certiorari would resolve this conflict.

C. Situs

The Second Circuit expanded the definition of the word "pier" to include a sea wall to a private residence but also decided that the "pier" need not be "customarily used . . . in loading, unloading, repairing, dismantling or building a vessel" which has caused a conflict among the Circuit Courts of Appeal. *Fleischmann*, 137 F.3d at 138-139. Finding that a retaining wall on a private residence was a covered "situs" under the LHWCA brought the Second

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6. Nowhere does Congress suggest that non-maritime employees such as construction workers, security guards or even janitors are intended to either benefit from the expansion of the Act or be included under the maritime employment requirement.

Note, *Director, Office of Workers' Compensation Programs v. Perini North River Assoc.: Judicial Dilution of the Longshoremen's and Harbor Workers' Compensation Acts "Status" Requirement*, 33 Cath U. L. Rev. 245, 256 (1983).

Circuit in direct conflict with the Eleventh Circuit. *See Brooker v. Durocher Dock & Dredge*, 133 F.3d 1390, 1393-1394 (11th Cir. 1998). *Brooker* held that a construction worker who was injured on a retaining wall was not covered by the LHWCA, since the retaining wall was not a "pier" within the meaning of the LHWCA. *See Brooker*, 133 F.3d at 1394.

The conflict arises over the ambiguity in § 903(a) of the Act which was mentioned but unresolved in *Northeast Marine Terminal Co. v. Caputo*: whether the modifying phrase "customarily used by an employer in loading, unloading, repairing, dismantling or building a vessel" applied solely to the term "adjoining area" or also modified the preceding terms "adjoining pier, wharf, dry dock, terminal, building way, marine railway . . ." *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 280-281 (1977). Put another way, if a pier was not customarily used in longshoring or ship repairing, was it a covered situs under the Act?

Caputo noted that Congress had "little concern with respect to how these facilities were used." *Id.* at 280. However, *Caputo* did not decide the issue because the employee in that case worked in an "adjoining . . . terminal . . . customarily used . . . in loading [and] unloading." *Id.* at 281.

Lacking such resolution, the Second Circuit decided to follow the Ninth Circuit's Opinion in *Hurston v. Director, Office of Workers' Compensation Programs*, interpreting Congress' intent to "leave the geographic areas such as a pier or wharf unlimited so long as they adjoin navigable waters of the United States." *Fleischmann*, 137 F.3d at 139, (quoting *Hurston v. Director, Office of Workers' Compensation Programs*, 989 F.2d 1547 (9th Cir. 1993)).

By contrast, the Eleventh Circuit held that whether a facility is a "pier" is a pure factual question in the absence of a definition in the LHWCA. *See Brooker*, 133 F.3d at 1393. The court found factual evidence in the record that the sea wall was not considered to be a "pier." *See id.* Since it was not a "pier", there was no need to decide whether the phrase "customarily used" modified the term "pier" in the statute. *Id.* at 1394.

Marine construction workers and their employees are thus left in significant doubt as to their status when they are injured on land. *See generally Laspragata v. Warren Georges, Inc.*, 21 BRBS 132 (1988); *Olson v. Healy Tibbits Construction Co.*, 22 BRBS 221 (1989); *Silva v. Hydro Dredge Co.*, 23 BRBS 123 (1989); *Johnson v. Orfanos Contracting Inc.*, 25 BRBS 329 (1992); *Pulkowski v. Hendricksen Bros. Inc.*, 28 BRBS 298 (1994); *Crapanzano v. Rice Mohawk*, 30 BRBS 8 (1996). These workers spend a great deal of time on land when they build and repair piers, bridges, docks, fender systems, sea walls, bulkheads, dolphins, mooring platforms and other fixed objects and the impact of the conflicts concerning situs is considerable.

It is not clear that Congress ever addressed the Second Circuit's concern over whether a marine construction worker might walk in and out of coverage depending on where the injury occurred. *See Fleischmann*, 137 F.3d at 139. Congress definitely expressed its will to maintain continuous LHWCA coverage for the specified categories of workers who engage in longshoring, shipbuilding or ship repairing. While Congress pushed the boundaries of coverage for those workers back into the terminal, it did not do so for workers falling outside those categories. As a result, the boundary for marine construction workers — the *Jensen* line — remains the same as it did before 1972. "There will always be a boundary to coverage, and there will always be people who cross it during their employment." *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 426 (1985) (citing *Nacirema Operating Co. v.*

Johnson, 396 U.S. 212, 223-224 (1969)). While good legislative policy might have dictated that all employees who were covered before 1972 for injuries on navigable waters now should be covered, when they go ashore, there is no evidence that Congress followed that path. Congress has expressly manifested its intent that the shoreward extension of the *Jensen* line bear some connection between the situs of the injury and either longshoring or shipbuilding/repairing operations. *See* S. Rep. No. 92-1125 at 1 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4698.

The status and situs tests of the 1972 amendments to the LHWCA continue to provide perplexing questions for the marine construction industry, as did the original 1927 Act with its "maritime but local" and "twilight zone" interpretations. While *Perini* covers those workers when they are injured on navigable waters, the Circuit Courts of Appeal need guidance, first on whether those same workers are covered, when they are injured on land and, secondly, whether the injuries on land must occur on a structure that has some connection to the loading, unloading, repairing or building a ship.

CONCLUSION

It is respectfully requested that this Petition for a Writ of Certiorari be granted and that this Court exercise its jurisdiction.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED FEBRUARY 23, 1998

Theodore FLEISCHMANN, Petitioner

v.

DIRECTOR, OFFICER OF WORKERS' COMPENSATION PROGRAMS, Seahorse Coastal Assistance & Towing and State Insurance Fund, Respondents.

No. 1401, Docket 96-4146

United States Court of Appeals
For the Second Circuit.

Argued April 1, 1997.

Decided February 23, 1998

* * *

Before OAKES and KEARSE, Circuit Judges, and MURTHA, Chief District Judge.*

OAKES, Senior Circuit Judge:

Appellant Theodore Fleischmann appeals the judgment entered October 4, 1994, by G. Marvin Bober, *Associate Chief Administrative Law Judge* ("ALJ Bober"), denying his application

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* The Honorable J. Garvan Murtha, Chief District Judge of the United States District Court for the District of Vermont, sitting by designation.

for benefits. Fleischmann was injured while repairing a washed-out bulkhead in a canal. ALJ Bober held that Fleischmann was not entitled to coverage under the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 901-950 (1994), because he was not injured on navigable waters, and because he did not qualify as an "employee" within the meaning of § 902(3). We reverse and remand, finding that Fleischmann meets the LHWCA's standards both as to his status as an employee and as to the situs of his injury.

Reversed and remanded.

I.

Facts

The parties do not dispute the following facts. Petitioner Theodore Fleischmann was employed in 1991 by Respondent Seahorse Coastal Assistance & Towing ("Seahorse") as a pile driver and a laborer. Fleischmann worked on constructing bulkheads, piers, and floating docks. In October of 1991, Fleischmann was helping to remove and replace a bulkhead at Center Island, on a canal off Oyster Bay leading to the northern shore of Long Island Sound. While ordinarily a bulkhead, which acts as a retaining wall for land, must border land on one side and water on the other, a large part of this bulkhead had collapsed forward into the water when the land behind had washed into the canal in a series of storms. A private residence abutted the area where the bulkhead had collapsed. The water contained a floating dock belonging to the property owner, to which a boat belonging to the owner's employee was tied. The completed bulkhead would prevent erosion of the land into the water.

Appendix A

Seahorse built the new bulkhead by driving piles deep into the bed of the canal, and attaching a horizontal retaining system to those piles. At the time of Fleischmann's accident, twelve to fifteen feet of water and muck still separated the solid land of this residence from the bulkhead. The repaired bulkhead was attached to the land at both ends, but pores in the bulkhead wall permitted water to seep behind it.

To complete construction of the bulkhead, Fleischmann helped to move material from the canal bottom to fill in the area landward of the bulkhead. Seahorse used material from the bottom of the canal as filler, to save money on material and transportation, and to deepen the water in the canal. Fleischmann and other Seahorse workers had nearly completed the process of moving dredging material behind the bulkhead at the time of Fleischmann's accident.

While repairing the bulkhead, Fleischmann worked primarily on a floating dock, which was tied to a barge. The equipment used to repair the bulkhead was floated to the job site on a barge belonging to Seahorse, and Fleischmann testified that he had helped to tie and untie the work boats that moved the barge there.

On October 22, 1991, Fleischmann was cleaning up the barge and removing lumber from the floating dock. At the time of his accident, he was on top of the bulkhead and moving the barge by pulling on a tow line. As Fleischmann reached for a second tow line, he slipped on the top of the bulkhead and fell over the landward side. His foot caught on the bulkhead, and he fell into the dredging material and water. Although Fleischmann got wet when he fell, his trapped boot kept him from going under the water completely. At the time Fleischmann fell, the tide was such that there was enough water behind the bulkhead to cover his

body. At the point where he fell, he was approximately fifteen feet from solid land.

II.

The ALJ's Decision

Fleischmann sustained injuries to his right knee from the fall and applied for benefits under the LHWCA. At his hearing, the parties stipulated that Fleischmann was "deemed to be temporary totally disabled from the date of accident." His petition was heard by Administrative Law Judge ("ALJ") Aaron Silverman, who retired prior to deciding the case. ALJ G. Marvin Bober was assigned to the matter and rendered a decision solely on the written record.

Section 920(a) of the LHWCA grants a presumption of coverage, which applies unless the employer presents substantial evidence to rebut the presumption. 33 U.S.C. § 920(a) (1994). ALJ Bober held that the § 920(a) presumption did not apply to questions of situs or status, and, thus, that Fleischmann had the burden of proving facts establishing his coverage under the Act.

ALJ Bober noted that to establish coverage under the LHWCA, Fleischmann had to establish both that he had status as an "employee" under § 902(3) and that the injury occurred on a situs covered under § 903(a). ALJ Bober also noted that if Fleischmann could show that he were injured on "navigable waters," as defined before the 1972 amendments to the LHWCA, he would be covered, without any further showing regarding his employee status, because the 1972 amendments were designed to expand, not to limit, coverage. ALJ Bober found that although the canal itself constituted navigable waters, Fleischmann was

not injured on actual navigable waters as defined before 1972, because water in the area where Fleischmann fell had been permanently withdrawn from the canal. ALJ Bober went on to find that Fleischmann lacked status as an "employee" within the meaning of § 902(3).

> The Claimant's job was not related to the movement of cargo between ship and land transportation, nor did it serve to facilitate these functions. Several Supreme Court decisions addressing Section 2(3) have "clearly decided that, aside from the specified occupations, land-based activity occurring within the § 903 situs will be deemed maritime only if it is an integral or essential part of loading or unloading a vessel." As the Claimant's employment did not entail such duties, it is not encompassed within the coverage afforded by Section 2(3).

He therefore made no ruling on the question whether Fleischmann's accident occurred upon a covered situs, as defined under the amended LHWCA.

Fleischmann appealed to the Benefits Review Board ("BRB"), and the Office of the Solicitor filed an amicus letter in his support. Because the BRB failed to render a decision within one year, the ALJ's decision was deemed affirmed. *See* Omnibus Consolidated Rescission and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, 1321-219 (1996). Fleischmann now brings direct appeal to our court, under § 921(c) of the LHWCA.

Appendix A

III.

Discussion

A. Standard of Review

The BRB hears appeals from decisions made by an ALJ under the LHWCA. 33 U.S.C. § 921(b)(3) (1994). The BRB must apply a narrow standard of review to those decisions and is required to affirm the ALJ's findings of fact as long as they are supported by substantial evidence in the record considered as a whole. *Id.; see also King v. Director, Office of Workers' Comp. Programs*, 904 F.2d 17, 18 (9th Cir. 1990) (per curiam); 20 C.F.R. § 802.301 (1997). We review BRB decisions "for errors of law and for adherence to the statutory standard governing the [BRB's] review of the administrative law judge's factual determinations." *King*, 904 F.2d at 18 (citation omitted).[1]

Although we agree with Fleischmann that the ALJ erred by failing to apply the § 920(a) presumption of coverage to questions of fact and by placing the burden of production of evidence on Fleischmann, this error does not affect our ruling. Because we base our ruling on essentially undisputed facts of record, addressing legal issues only, we would reach the same conclusion even if we determined that the presumption did not apply.

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1. Fleischmann argues that we ought to apply a more stringent standard of review to ALJ Bober's Decision and Order because ALJ Bober was not the actual trier of fact for purposes of the hearings; ALJ Silverman presided during that stage of the proceedings. However, we do not need to decide whether to apply a more stringent standard of review to findings of fact in this case, since we base our decision on facts that are undisputed in all salient respects.

B. Coverage Under the LHWCA

Before 1972, the LHWCA covered only employees who were injured on actual navigable waters; the LHWCA did not cover employees injured on land, or on structures connected to land, no matter how close to the water the injury occurred. *See Nacirema Operating Co. v. Johnson*, 396 U.S. 212, 223-24, 90 S. Ct. 347, 354, 24 L. Ed. 2d 371 (1969) (holding that the LHWCA did not extend to injuries sustained on a pier). Recognizing that "compensation . . . should not depend on the fortuitous circumstance of whether the injury occurred on land or over water," Congress amended the LHWCA in 1972. H. Rep. No. 92-1441, at 10 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4698, 4708. The 1972 amendments extended coverage under § 903(a) to include injuries that occurred "upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)." 33 U.S.C. § 903(a) (1994). While Congress expanded the number of locations of injury that would allow an employee to qualify for coverage, it also added language to § 902(3) to restrict the kinds of employees that the LHWCA covers. Under the 1972 amendments, an injured worker must be "engaged in maritime employment" to be covered under the LHWCA. 33 U.S.C. § 902(3). Thus, the LHWCA as amended requires both (1) that a worker be engaged in "maritime employment" under § 902(3), and (2) that his or her injury occur on navigable waters or on one of the listed areas under § 903(a). *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 265, 97 S. Ct. 2348, 2357, 53 L. Ed. 2d 320 (1977). These two requirements are respectively referred to as the "status" and "situs" requirements.

Because Congress intended the 1972 amendments to expand the scope of coverage, an employee can still establish coverage by demonstrating that he or she satisfies the situs test as it existed before it was expanded by the 1972 amendments, without having to make any further showing regarding status as an employee under § 902(3). *See Director, Office of Workers' Comp. Programs, U.S. Dep't of Labor v. Perini N. River Assocs*, 459 U.S. 297, 325, 103 S. Ct. 634, 651, 74 L. Ed. 465 (1983); *McCarthy v. The Bark Peking*, 716 F.2d 130, 132-33 (2d Cir. 1983) (where a painter was injured on actual navigable waters in the course of his employment, "no more is required to qualify . . . as a statutory 'employee' "). Because Fleischmann has established the requirements for coverage under the LHWCA as amended, however, we do not need to determine whether the landward side of the bulkhead constituted actual navigable waters for purposes of determining whether he satisfies the pre-amendment test of coverage.

1. Status

ALJ Bober decided that Fleischmann did not qualify as an employee under § 902(3) because "his job was not related to the movement of cargo between ship and land transportation, nor did it serve to facilitate these functions." He relied on *Chesapeake and Ohio Railway v. Schwalb,* which held that "aside from the specified occupations, land-based activity occurring within the § 903 situs will be deemed maritime only if it is an integral or essential part of loading or unloading a vessel." *Schwalb,* 493 U.S. 40, 45, 110 S. Ct. 381, 384, 107 L. Ed. 2d 278 (1989). Even while quoting *Schwalb,* however, the ALJ failed to note that *Schwalb*'s requirement regarding loading or unloading a vessel applies only to land-based activity "aside from the specified occupations." *Id.* The Court in *Schwalb* explicitly exempted

enumerated occupations from the requirement that the activity be an integral or essential part of loading or unloading a vessel, and read the Supreme Court's precedent as doing so. *See id.* at 46, 110 S. Ct. at 384 ("We also reiterated in *Herb's Welding, Inc. v. Gray* [470 U.S. 414, 423, 105 S. Ct. 1421, 1427, 84 L. Ed. 2d 406 (1985)], that the maritime employment requirement as applied to land-based work *other than longshoring and the other occupations named in § 902(3)* is an occupational test focusing on loading and unloading.") (emphasis added).

The Director urges that Fleischmann, a marine construction worker, qualifies as a "harbor worker," one of the occupations specifically listed in § 902(3). While we owe no deference to the BRB, we do grant deference to the views of the Director of the Office of Workers' Compensation Programs, a Respondent in this case, with regard to questions of interpretation of the LHWCA. *See Director, Office of Workers' Comp. Programs, U.S. Dep't of Labor v. General Dynamics Corp.*, 982 F.2d 790, 795 (2d Cir. 1992); *Mallott & Peterson v. Director, Office of Workers' Comp. Programs, Dep't of Labor*, 98 F.3d 1170, 1172 (9th Cir. 1996) (" '[C]onsiderable weight' is accorded to the statutory construction of the LHWCA urged by the Director." (quoting *Hunt v. Director, Office of Workers' Comp. Programs, U.S. Dep't of Labor*, 999 F.2d 419, 421 (9th Cir. 1993))), *cert. denied*, __ U.S. __, 117 S. Ct. 1842, 137 L. Ed. 2d 1046 (1997). If the Director's interpretations and administrative policies are reasonable and consistent with the purposes of the LHWCA and with clearly expressed legislative intent, those interpretations control. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 & nn.9 & 11, 104 S. Ct. 2778, 2781-83 & nn.9 & 11, 81 L. Ed. 2d 694 (1984); *Chemical Mfrs. Ass'n v.*

Natural Resources Defense Council, Inc., 470 U.S. 116, 125-26, 105 S. Ct. 1102, 1107-08, 84 L. Ed. 2d 90 (1985).[2]

The Director's interpretation of the term "harbor worker" to include marine construction workers should be accorded deference because the term "harbor worker" is undefined and ambiguous, and because including marine construction workers within the meaning of "harbor worker" is reasonable and preserves the purposes of the statute. Generally, the Court has adjudged that "[t]he language of the 1972 Amendments is broad and suggests that we should take an expansive view of the extended coverage." *Caputo*, 432 U.S. at 268, 97 S. Ct. at 2359. Although we do not decide whether Fleischmann fell into actual navigable waters, it is undisputed that had he been injured while working on the floating dock rather than on the bulkhead itself, he would

2. Seahorse argues that we should not accord deference in this case because the Director's interpretation tends to expand the scope of coverage of the LHWCA. Because deference to administrative agencies is based on a congressional delegation of interpretive authority, Seahorse argues it is unlikely that Congress would delegate authority to an agency to determine its own jurisdictional reach. *See* Cass A. Sunstein, *Law and Administration After Chevron*, 90 Colum. L. Rev. 2071, 2097-2100 (1990). However, the Supreme Court has deferred to agency interpretations that arguably determine jurisdiction, and there appears to be no clear test for whether an interpretation should be considered "jurisdictional." See *id.* at 2098-2099 & nn.126 & 132-133. The issue here, the meaning of "harbor worker" within § 902(3), while arguably jurisdictional, does not evoke the concerns that would make it unlikely that Congress delegated authority to the agency for its determination. The agency does not seek to extend its authority to a large category of cases, nor to abdicate its enforcement power, and the expertise of the Director is relevant to the determination. See *id.* at 2100 ("[A] general rule of deference would be preferable even on jurisdictional questions, . . . [where] the agency's competence bears on the resolution of jurisdictional ambiguities. . . . [T]he question is whether the agency is seeking to extend its legal power to an entire category of cases, rather than disposing of certain cases in a certain way or acting in one or a few cases.").

have been covered under *Perini*. One of Congress's purposes in amending the LHWCA was to "ensure that a worker who could have been covered part of the time by the pre-1972 Act would be completely covered by the 1972 Act." *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 75, 100 S. Ct. 328, 333, 62 L. Ed. 2d 225 (1979). *See also Caputo*, 432 U.S. at 272, 97 S. Ct. at 2361.

Our finding that Fleischmann qualifies as a harbor worker also comports with the Supreme Court's and this circuit's reading of the requirements of § 902(3). ALJ Bober made a factual finding that Fleischmann's general employment responsibilities included "building bulkheads, piers, and floating docks." An employee can establish coverage under § 902(3) either by referring to his or her overall duties or to the particular project the employee was engaged in at the time of injury. *See Caputo*, 432 U.S. at 273, 97 S. Ct. at 2362 ("Both the text and the history [of the LHWCA] demonstrate a desire to provide continuous coverage throughout their employment to these amphibious workers who, without the 1972 Amendments, would be covered only for part of their activity."); *Browning v. B.F. Diamond Constr. Co.*, 676 F.2d 547, 548 (11th Cir. 1982) ("[E]mployee status can be based upon the maritime nature of the employment as a whole or upon the maritime nature of the claimant's activity at the time of the injury."); *Hullinghorst Indus. v. Carroll*, 650 F.2d 750, 754 (5th Cir. 1981).

The Second Circuit has determined that the category of "harbor worker" under § 902(3) requires some connection to ships. *See Fusco v. Perini N. River Assocs.*, 622 F.2d 1111, 1113 (2d Cir. 1980) ("To come within § 2(3) a harborworker's activity must relate to ships . . . ."). Although ALJ Bober did not make findings of fact with respect to whether the bulkhead was capable of mooring ships, Fleischmann's general employment of building piers and docks suffices to establish the requisite connection to

ships to confer him with status as a harbor worker.[3] *Cf. Fusco*, 622 F.2d at 1113 (finding that employee injured in construction of sewage disposal plant did not establish the required connection to ships or navigation to qualify as a "harbor worker").

The reasonableness of categorizing Fleischmann as a harbor worker is supported by consistent decisions of the BRB involving marine construction workers. While the BRB, as opposed to the Director, does not merit deference, *see General Dynamics Corp.*, 982 F.2d at 795, the BRB's consistent decisions bear upon the reasonableness of the Director's interpretation. *See Morrison-Knudsen Constr. Co. v. Director, Office of Workers' Comp. Programs, U.S. Dep't of Labor*, 461 U.S. 624, 635, 103 S. Ct. 2045, 2051, 76 L. Ed. 2d 194 (1983) (considering the consistent practice of the BRB relevant in interpreting the LHWCA). The BRB has held workers on various shore-side structures to be harbor workers within § 902(3). *See Olson v. Healy Tibbitts Constr. Co.*, 22 Ben. Rev. Bd. Serv. (MB) 221, 224 (May 24, 1989) (finding a worker engaged in repairing a breakwater, whose duties included driving piling, loading and unloading barges, and light maintenance, to be covered as a harbor worker); *Bakke v.*

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3. Furthermore, it is not disputed that at the time of his injury Fleischmann had been assisting Seahorse in the process of filling in the area behind the bulkhead with material dredged from the bottom of the canal; Seahorse's president testified that, aside from financial considerations, the reason Seahorse dredged the bottom of the canal was to deepen the water, which would have the effect of increasing navigability. In addition, Seahorse did not dispute Fleischmann's testimony that when transporting Seahorse's equipment to the site of the bulkhead, Fleischmann rode upon a barge and engaged in the process of tying and untying the vessels used to transport it. *See Silva v. Hydro-Dredge Corp.*, 23 Ben. Rev. Bd. Serv. (MB) 123, 127 (Nov. 30, 1989) (per curiam) (considering whether any "ships or barges were used" in the construction project at issue, and whether "the harbor was dredged as part of the project" in determining whether an employee had status under § 902(3)).

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Appendix A

Duncanson-Harrelson Co., 8 Ben. Rev. Bd. Serv. (MB) 36, 39 (Feb. 24, 1978) (holding that a pile driver involved in the construction and repair of piers was a harbor worker); *Stewart v. Brown & Root, Inc.*, 7 Ben. Rev. Bd. Serv. (MB) 356, 366 (Jan. 12, 1978) (holding that a painter-sandblaster working on the construction site of a dry dock was a harbor worker), *aff'd sub nom. Brown & Root v. Joyner*, 607 F.2d 1087, 1090 n.5 (4th Cir. 1979). In *Trotti & Thompson v. Crawford*, 631 F.2d 1214, 1222 (5th Cir. 1980), the court based its affirmance of coverage of a pier construction worker on the traditional maritime nature of the employment.[4] While the case did not present the issue of deference

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4. We wish to emphasize that we do not base our holding that Fleischmann has occupational status on any version of the test first articulated by the Ninth Circuit in *Weyerhaeuser Co. v. Gilmore*, 528 F.2d 957, 961 (9th Cir. 1982), and followed in many of the cases cited by Fleischmann, which framed its inquiry upon whether the employment bore "a realistically significant relationship to 'traditional maritime activity involving navigation and commerce on navigable waters.' " *Id.* This test tended to focus attention on the amount of time an employee spent working over navigable waters. *See, e.g., Odom Constr. Co. v. United States Dep't of Labor*, 622 F.2d 110, 113 (5th Cir. 1980); *Boudloche v. Howard Trucking Co.*, 632 F.2d 1346, 1347 (5th Cir. 1980). The Second Circuit has rejected an inquiry based upon time in the water. See Fusco, 622 F.2d at 1113 ("It is not significant that . . . the claimants performed part or all of their work while upon floating stages or upon barges [located in navigable waters].") Furthermore, *Herb's Welding v. Gray* has been read to have rejected the Weyerhaeuser test in determining whether non-enumerated occupations qualified as maritime employment. *See Coloma v. Director, Office of Workers Comp. Programs*, 897 F.2d 394, 398-99 (9th Cir. 1990) (reading Herb's Welding and Schwalb to require that land-based activity be covered only if an essential part of loading or unloading a vessel, and implicitly to overrule cases that found land-based activity other than enumerated occupations covered only on the basis of a significant relationship with maritime commerce); *Sea-Land Service, Inc. v. Rock*, 953 F.2d 56, 66 (3rd Cir. 1992). Because we defer to the Director's definition of "harbor worker" to include marine construction workers such as Fleischmann, and because *Schwalb* clearly excepted *enumerated* occupations from the requirement of a connection to loading and unloading a vessel, we need not decide whether Fleischmann's work would qualify for coverage under the status test for non-enumerated maritime employees as articulated in *Herb's Welding* and *Schwalb*.

to the Director's definition of "harbor worker," the court indicated that it would consider defining "harbor worker" to include marine construction workers to be reasonable: "Our examination of the common usage and pre-1972 judicial construction of the term 'harbor worker' leaves us open as to what Congress intended the term to include." *Id.* at 1222 n.19. We have concluded that Congress intended that we defer to reasonable definitions of the terms of the LHWCA put forward by the Department of Labor through the Director; including construction workers such as Fleischmann within the term "harbor worker" is reasonable and therefore comports with Congress's intent.

2. Situs

Under the 1972 amendments, a situs covered by the LHWCA includes navigable waters and "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel." 33 U.S.C. § 903(a). In reading this section, the Supreme Court has noted that "it is not at all clear that the phrase 'customarily used' was intended to modify more than the immediately preceding phrase 'other areas.' " *Caputo,* 432 U.S. at 280, 97 S. Ct. at 2365. In finding that a pier that was not customarily used by the employer for loading or unloading a vessel nevertheless constituted a covered situs, the Court read the legislative history of the LHWCA as evidencing "little concern with respect to how [the enumerated] facilities were used." *Id.* The Ninth Circuit has squarely held that the language "customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel," does not modify any of the enumerated structures. *Hurston v. Director, Office of Workers Comp. Programs*, 989 F.2d 1547, 1552 (9th Cir. 1993).

The Ninth Circuit in *Hurston* articulated a strictly structural definition of the term "pier": "a structure built on pilings extending from land to navigable water is an 'adjoining pier' within the meaning of 33 U.S.C. § 903(a)." *Id.* at 1553. It employed this definition to determine that a structure used only for storing and processing oil did constitute a pier for the purposes of § 903(a). Although the dissent in *Hurston* characterized the definition as "a literal interpretation," *id.* at 1554, and although the structure at issue in that case was called "Elwood Pier No. 1," the decision did not depend solely on the structure's nomenclature. Instead, the court focused primarily on the intent of Congress in amending the LHWCA. *Id.* at 1550-1553. The court noted that Congress's failure to define "pier" suggests that Congress intended to "leave the geographic areas such as a pier or wharf unlimited so long as they adjoin navigable waters of the United States." *Id.* at 1551. The court guided itself by the ameliorative purpose of the 1972 amendments: "the 1972 amendments were intended to 'provide[ ] continuous coverage to a worker who would otherwise be covered for only a part of his activity' and . . . [to] alleviate[ ] the anomaly of a longshoreman's walking in and out of coverage depending on which side of the gang plank an injury occurred." *Id.* at 1552 (quoting *Williams v. Director, Office of Workers Comp. Programs*, 825 F.2d 246, 247 (9th Cir. 1987)).

We adopt the majority's reasoning in *Hurston*. The bulkhead at issue, built on pilings and extending into navigable water, constitutes a pier within the meaning of § 903(a). That the bulkhead is not called a pier does not affect our determination. This case exemplifies the concerns that fueled the 1972 amendments; Fleischmann would clearly have been covered had he been injured while working on a work platform only several feet away, where he spent a substantial portion of his work hours. Although the line demarking a covered situs has to be drawn somewhere,

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Congress made it clear in enacting the 1972 amendments that it considered the water's edge an arbitrary place to draw it. Congress did not want a system in which coverage depend[ed] on the "fortuitous circumstance of whether the injury . . . occurred on land or over water." *Caputo*, 432 U.S. at 272, 97 S. Ct. at 2361 (quoting H.R. Rep. 1441, at 10 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4698, 4708).

The BRB has also focused on the physical composition of shore-side structures and has allowed a range of structures to qualify as piers within the meaning of § 903(a). In doing so the BRB has found structures not ordinarily referred to as "piers" nevertheless to qualify as such under the statute. In *Olson*, the BRB found that a breakwater, located in an area containing a dock, constituted a "pier," considering that it helped to form and protect a harbor. *Olson*, 22 Ben. Rev. Bd. Serv. (MB) at 224. *See also Pulkoski v. Hendrickson Bros.*, 28 Ben. Rev. Bd. Serv. (MB) 298, 302 (Oct. 28, 1994) (analogizing a bulkhead designed to prevent land erosion to the breakwater in *Olson* and to the pier in *Hurston*, but declining to decide whether the bulkhead constituted an enumerated situs because the injury did not occur on the bulkhead). Here, the bulkhead would prevent erosion of the adjacent property into the water; the water contained a dock belonging to the property owner, to which a boat was tied, as well as other docks. That the area was residential does not affect our analysis. *See Eckhoff v. Dog River Marina*, 28 Ben. Rev. Bd. Serv. (MB) 51, 55 (Mar. 29, 1994) (per curiam) (finding a pier connected to employer's president's home and used only for non-commercial purposes nevertheless to be a covered situs under § 903(a)); *Ries v. Harry Kane, Inc.*, 13 Ben. Rev. Bd. Serv. (MB) 617, 620 (June 30, 1981) ("The fact that a facility is used exclusively by private pleasure craft is an insufficient reason for holding that it is not a harbor facility or that a claimant working on this facility is not a harbor-worker.").

Thus, we follow the direction of the Supreme Court and adopt the analysis of the Ninth Circuit in focusing on the structure of the bulkhead to find it to constitute a pier within the meaning of § 903(a).

Conclusion

For the above reasons, we reverse and remand to the Benefits Review Board for determination of benefits.

APPENDIX B — NOTICE FROM THE CLERK OF THE U.S. DEPARTMENT OF LABOR, BENEFITS REVIEW BOARD DATED SEPTEMBER 12, 1996

U.S. Department of Labor Benefits Review Board
800 K Street N.W.
Washington, D.C. 20001-8001

Re: Theodore Fleischmann v. Seahorse Coastal Assistance, State Insurance Fund Director, Office of Workers' Compensation Programs (Case No. 93-LHCA-0268) (OWCP No. 02-108757) (BRB No. 95-0567)

NOTICE FROM THE CLERK OF THE BENEFITS REVIEW BOARD

Pursuant to the provisions of Public Law 104-134 (Omnibus Appropriations for Fiscal Year 1996), enacted on April 26, 1996, appeals from decisions under the Longshore and Harbor Workers Compensation Act, 33 U.S.C. 901, *et seq.* which have been pending before the Benefits Review Board for more than one year, shall, if not acted upon before September 12, 1996, be considered affirmed by the Board and shall be considered the final order of the Board for purposes of obtaining a review in the United States courts of appeal.

According to our records, the appeal in the instant case has now been pending at the Benefits Review Board for more than one year. Therefore, consistent with Public Law 104-134, this decision pending review by the Benefits Review Board is considered affirmed and shall be considered the final order of the Board for purposes of obtaining review in the United States

courts of appeal. Attached please find an outline of the procedures for appealing to the courts of appeal.

DATE: SEP 12 1998

Sincerely

s/ Thomas O. Sherperd Jr. P.F.
Thomas O. Shepherd, Jr.
Clerk of the Board

APPENDIX C — DECISION AND ORDER OF THE U.S. DEPARTMENT OF LABOR DENYING BENEFITS DATED OCTOBER 4, 1994

U.S. Department of Labor Office of Administrative Law Judge
800 K Street N.W.
Washington, D.C. 20001-8002

Case No. 93-LHC-268

OWCP No. 2-108757

In the Matter of

THEODORE FLEISCHMANN,

Claimant,

v.

SEAHORSE COASTAL ASSISTANCE & TOWING, LTD.

Employer,

and

STATE INSURANCE FUND,

Carrier,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

Party-in-Interest.

Appendix C

Appearances:

Jacob Shisha, Esq.
For the Claimant

Richard A. Cooper, Esq.
For the Employer

Before: G. Marvin Bober
Associate Chief Judge

DECISION AND ORDER DENYING BENEFITS

This is a claim for compensation under the Longshore and Harbor Workers' Compensation Act (the Act), as amended, 33 U.S.C. § 901 *et seq.*, filed by Theodore Fleischmann (Claimant) against Seahorse Coastal Assistance & Towing (Employer) and State Insurance Fund (Carrier). Since the issues raised could not be resolved, the matter was referred to the Office of Administrative Law Judges (OALJ) for resolution.

On October 29, 1993, a hearing was held before Judge Aaron Silverman[1] in New York, New York. All the parties were given full opportunity to adduce testimony, offer documentary evidence, and present oral argument pursuant to the Act and the regulations promulgated thereunder.

In evaluating the evidence to reach a decision in this case, I am guided by the principle that disability is an economic concept which is dependent upon such factors as Claimant's age,

1. As Judge Silverman has retired, the undersigned is overseeing and deciding this matter on the record pursuant to his order dated August 24, 1994.

industrial history, physical condition, and the availability of work which he is capable of performing. *See American Mutual Insurance Co. v. Jones*, 426 F.2d 1263, 1265 (D.C. Cir. 1970). While the Claimant is entitled to the statutory presumptions set forth at 33 U.S.C. § 920, the burden of persuasion on all issues with respect to entitlement to benefits remains with the Claimant under Section 7(c) of the Administrative Procedure Act. *See Director, OWCP v. Greenwich Collieries*, No. 93-744, 1994 WL 266575, at *13-14 (S. Ct. June 20, 1994).

STIPULATIONS

The parties have stipulated, and I find:

1. Claimant was injured during and in the course of employment.

2. The date of injury was October 22, 1991.

3. An employer/employee relationship existed at the time of injury.

4. The average weekly wage at the time of the injury was $361.65, yielding a compensation rate of $241.10.

5. All notices were timely filed.

STATEMENT OF FACTS

In December 1990, the Claimant, Theodore Fleischmann, began working for the Employer, Seahorse Coastal Assistance & Towing, as a pile driver and laborer. The Claimant's responsibilities entailed building bulkheads, piers, and floating

docks. While working in this capacity on October 22, 1991, the Claimant sustained an injury to his right knee.

At that time, the Claimant was working at a job on Center Island, an area located off the Long Island Sound in a tributary of Oyster Bay Harbor. At this worksite, the Employer was removing and replacing sixty feet of bulkhead[2] (Trans. at 24).[3] At the time of the Claimants accident, the new bulkhead had already been set, and almost all the backfilling had been completed. The only remaining jobs were installing the cap[4] and adding dredging material behind the bulkhead (Trans. at 38-39). At approximately 2:00 p.m., the Claimant, who was standing on the bulkhead, slipped and fell, injuring himself (Trans. at 42, 44). His boot caught on top of the bulkhead, and he fell into the dredging material and water on the land side of the bulkhead (Trans. at 44). Although the Claimant got wet when he fell, he was kept from going under by his foot, which was caught on the bulkhead (Trans. at 45). As a result of the accident, the Claimant suffered an injury requiring surgery to his right knee.

Discussing the incident, the Claimant testified that he could not walk on the dredging material as a few feet of topsoil had

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2. The term bulkhead is being used in this case to refer to a wall separating private property and a canal. The bulkhead was designed to maintain the integrity of the property.

3. The following abbreviations will be used herein Administrative Law Judges Exhibit — "ALJ;" Employer's Exhibit — "EX;" Claimant's Exhibit — "CX"; and the hearing transcript — "Trans."

4. Peter F. Stefemann, the owner of the Employer, Seahorse Coastal Assistance & Towing testified that he observed that the cap had already been installed on the bulkhead at the time the Claimant was injured.

to be added to make it functional land (Trans. at 46). At the spot where the Claimant was injured, the bulkhead and firm land were separated by fifteen feet (Trans. at 48). The owner of Seahorse, Peter F. Stefemann, testified at the hearing that the backfill was topped off to a final grade after it had dried out for two weeks (Trans. at 89). He further stated that this was done through the addition of four or five inches of top soil over some sand which was put in below (Trans. at 89). He also testified that the type of land adjacent to the bulkhead never dries out completely, as it constantly absorbs water with tidal variations (Trans. at 93). The area where the work was done is strictly a residential area, and large vessels cannot actually pass through the area of Oyster Bay adjacent to this canal due to a lack of sufficient water depth (Trans. at 92-93).

DISCUSSION AND CONCLUSIONS

The only issue raised in this proceeding is coverage under the Act. It is the Employer's position that the Claimant has neither status under Section 2(3), nor situs under Section 3(a) of the Act. The Employer requests that this matter be referred back to the District Director for further proceedings if the Claimant is found to have properly satisfied these requirements. I find, however, that the Claimant has not satisfied the status requirement set forth in Section 2(3). Accordingly, as both the status and situs requirements must be satisfied, I additionally find that this claim is not subject to coverage under the Act.

Section 2(3) of the Act defines an "employee" as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder and ship-breaker." While "maritime employment"

is not limited to the occupational examples used in the statute, the case law and legislative history demonstrate that the term was designed to extend coverage to "any worker who moves cargo between ship and land transportation. . . ." *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 84-85 (1979); *see Herbs Welding, Inc. v. Gray*, 470 U.S. 14, 423-24 (1985); H.R. REP. No. 1441, 92d Cong., 2d Sess. 11 ('972), reprinted in 1972 U.S.C.C.A.N. 4698, 4708 ("The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activities"); S. REP No. 1125, 92d Cong., 2d Sess. 13 (1972).

The status requirement was added to the Act in 1972, and employees who would have been covered prior to 1972 because their injuries took place on navigable waters (as then defined) remain covered by virtue of such prior coverage. *See Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 325 (1983). Therefore, to satisfy the status requirement in Section 2(3), the Claimant must show either that he was injured upon "actual navigable waters," or that he satisfies the occupational status test set forth in the statute.

Because the Section 20(a) presumption does not apply to questions of situs or status, the Claimant has the burden of proving the facts to establish coverage under the Act. *See Pittson Stevedoring Corp. v. Dellaventura*, 544 F.2d 35, 48 (2d Cir. 1976). In the present case, the evidence shows that the Claimant sustained his injury upon the bulkhead itself and the areas landward of the bulkhead. Because any water in this area had been permanently withdrawn from the canal, it was no longer part of a navigable body. *See LePore v. Petro Concrete Structures, Inc.*, 23 BRBS 403, 406-07 (1990) (citing *Jeffers v.*

Foundation Co., 85 F.2d 24 (2d Cir. 1936)). In *LePore, supra,* the Benefits Review Board has stated that

> . . . water can only be deemed navigable when it forms a highway over which commerce is or may be carried on with other states or foreign countries. A threshold requirement under this test is the presence of an "interstate nexus" in order for the body of water in question to function as continuous highway for commerce between ports. Thus, *a natural or artificial waterway which is not susceptible of being used as an interstate artery of commerce because of either manmade or natural conditions is not navigable waters* for purposes of jurisdiction.

LePore, supra at 406-07 (emphasis added). As such, I find that the Claimant has failed to establish that he was injured upon actual navigable waters.

I also find that Claimant failed to satisfy the occupational status test of Section 2(3). The Claimant's job was not related to the movement of cargo between ship and land transportation, nor did it serve to facilitate these functions. *See Chesapeake and Ohio Railway Co. v. Schwalb*, 493 U.S. 40, 46 (4989). Several Supreme Court decisions addressing Section 2(3) have "clearly decided that, aside from the specified occupations, land-based activity occurring within the § 903 situs will be deemed maritime only if it is an integral or essential part of loading or unloading a vessel." *See Id.* at 45. As the Claimants employment did not entail such duties, it is not encompassed within the coverage afforded by Section 2(3).

Appendix C

Based upon the foregoing, I find that the Claimant has failed to establish status coverage pursuant to the Act, and therefore, the Claimant is not eligible for benefits thereunder.

ORDER

Accordingly, it is ORDERED that:

The claim for benefits under the Act as filed by the Claimant, Theodore Fleischmann, against the Employer, Seahorse Coastal Assistance & Towing, and the Carrier, State Insurance Fund, should be, and is, hereby DENIED.

s/ G. Marvin Bober
G. MARVIN BOBER
Associate Chief Judge

Dated OCT 4 1994
Washington, D.C.

GMB/mc